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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PASQUALE STEVEN CUSANO,

Defendant and Appellant.

D069889

(Super. Ct. No. SCD264110)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed.

Randy Mize, Chief Deputy Public Defender, Frank L. Birchak and Maryann D'Addezio Kotler, Deputy Public Defender, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Alastair J. Agcaoili and Annie Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, Pasquale Steven Cusano entered a guilty plea to one count of obtaining the personal identifying information of 10 or more individuals with an

intent to defraud (Pen. Code,¹ § 530.5, subd. (c)(3)). The remaining charges and allegations were dismissed. Cusano was granted probation on certain terms and conditions including 180 days in jail.

One of the conditions imposed by the court was that he waive certain Fourth Amendment rights regarding electronic data and communications. Cusano objected to the condition as overbroad and unnecessarily impinging on protected information. The court imposed the condition over his objection. Cusano appeals challenging only the electronic search waiver. On appeal he contends the condition must be eliminated or modified because it could potentially allow law enforcement officers to view communications with his attorney. He also argues the condition is overbroad because it would potentially allow searches of data acquired before his probationary period began.

We will find the electronic search waiver was properly imposed in this case involving identity theft. It is also appropriate given Cusano's history of theft related offenses. There is nothing in the record that indicates there is a likelihood of interference with attorney-client communication. On balance, we will find the condition is reasonable for the rehabilitation of this defendant under the factual circumstances of this offense and the defendant's criminal history. Accordingly, we will affirm.

STATEMENT OF FACTS

This case arises from a guilty plea; thus the summary of facts is based on the probation report. We will adopt the factual summary in the respondent's brief.

¹ All further statutory references are to the Penal Code unless otherwise specified.

In October 2015, Paradise Point Resort in San Diego contacted the police to report the fraudulent bookings of two of its rooms. When the police arrived at the resort to investigate, they apprehended appellant and several others outside the rooms in question. A search of the rooms produced a trove of other people's personal identifying information, including credit card numbers, receipts, tax returns, checks, and driver's licenses. In one of the rooms, police also found a notebook with handwritten records of different people's identifying information, including social security numbers, credit cards, and answers to security questions used to access personal accounts. Also inside the rooms were several electronic devices, including computer tablets and cell phones. One of the rooms had \$2,400 in charges from the resort.

The police also searched a vehicle parked outside the rooms. Appellant had been loading items into the vehicle when the police arrived. Inside the vehicle, police found materials used for check fraud, including blank check paper, stolen checks, altered checks, and a laser printer. The police also found a laptop and counterfeit currency, as well as additional personal identifying information of persons other than appellant and his companions. In both the vehicle and the rooms, police found various weapons, drugs, bolt cutters, and lock pick kits.

Appellant admitted that several of the items found in the rooms and the vehicle were his, including the notebook containing personal identifying information of others, several of the electronic devices, and the lock pick kits. Appellant admitted that the only reason he would have many of those items was to commit fraud. He admitted that he had succeeded on different occasions using other people's credit card information to make

fraudulent online purchases. He admitted to knowing that one of the other people apprehended with him had also previously engaged in fraud. None of the individuals whose personal information was found in appellant's possession had given appellant consent to use that information.

DISCUSSION

Over Cusano's objection the trial court imposed the following electronic search waiver:

"[T]he defendant provides specific consent within the meaning of P.C. § 1546 et seq. to probation and/or a law enforcement government entity seeking information protected by the California Electronic Communication Protection Act. This consent includes consent to seize and examine call logs, texts and voicemail messages, photographs, emails, and social media account contents contained on any device or cloud or internet connected storage owned, operated, or controlled by the defendant, including but not limited to mobile phones, computers, computer hard drives, laptops, gaming consoles, mobile devices, tablets, storage media devices, thumb drives, Micro SD cards, external hard drives, or any other electronic storage devices, by probation and/or a law enforcement entity seeking the information. [¶] The defendant shall also disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any of the aforementioned devices or social media accounts."

As we have noted, Cusano contends the condition is overbroad in that it potentially impinges on the right to private communication with counsel and that it permits access to too much material and is therefore inconsistent with the court's analysis in *Riley v. California* (2014) ___ U.S. ___ [134 S.Ct. 2473] (*Riley*). We will first discuss the general legal principles regarding probation conditions and then analyze each of Cusano's contentions.

A. Legal Principles

In testing the validity of a probation condition, we look to the relationship of the proposed limitation on otherwise lawful activity and determine if it is related to preventing the defendant from continuing criminal activity and has some relationship to the offense and the offender's background. (*People v. Lent* (1975) 15 Cal.3d 481, 486-487.) Even where the condition meets the requirements of *Lent*, it still must be tailored to the purpose of probation in cases where the condition infringes on a constitutional right. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 942.) Conditions which limit a person's constitutional rights must be sufficiently narrow in order to avoid being declared overbroad. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

Where a defendant challenges a probation condition as overbroad the person must show the provision would result in "some concrete impairment of constitutionally protected conduct." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333; *People v. Olguin* (2008) 45 Cal.4th 375, 384.)²

In *People v. Ervine* (2009) 47 Cal.4th 745, 769, the court held that a defendant's " 'enduring fear' " that his private attorney-client communications might be exposed is not sufficient to justify a finding of violation of the Sixth Amendment right to counsel.

Where some aspects of a defendant's crime involved the use of electronic devices an electronic search condition may be appropriate to prevent the person from returning to

² In the context of a facial challenge to an ordinance, the court in *Tobe v. Santa Ana* (1995) 9 Cal.4th 1069, 1084, observed that a facial challenge on the grounds of constitutional overbreadth cannot be based on mere hypothetical possibilities. We believe such limitations should also be applied to a facial challenge to the language of a probation condition on the grounds it is overbroad.

the same criminal activity and provide the necessary monitoring of the probationer's activity. (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175-1176.)

B. Sixth Amendment Claim

Cusano first argues the search condition at issue would possibly infringe on his Sixth Amendment right to counsel. Cusano posits the chance that law enforcement implementing a search condition could conceivably find an e-mail from an attorney, or find a reference to an attorney in the cell phone call log. He contends that such possible discoveries might interfere with his right to private discussions with counsel. We have several problems with this argument.

First, the search condition on its face does not authorize interception of communications with Cusano's attorneys. Indeed, it does not authorize contemporaneous interception with communications. The fact that there is a hypothetical possibility that some trace of a communication with an attorney might be found on an electronic device is simply speculation. For that matter, any search condition could involve a conceivable contact with some form of privileged communication that has been left in a residence.

Second, the condition does not prevent private communication with counsel. It will take little imagination for Cusano and his attorneys, if there is ever a need to communicate, to find a method to do so without possible traces left behind on an electronic device. As the courts have discussed in *Tobe v. Santa Ana*, *supra*, 9 Cal.4th at page 1084, and *People v. Ervine*, *supra*, 47 Cal.4th at page 769, mere speculation or fear of possible interference is not sufficient to give rise to a constitutional intrusion. We do

not believe the electronic search condition is overbroad in its possible impact of hypothetical attorney-client communications.

C. The Condition Is Not Overbroad

Relying principally on *Riley, supra*, 134 S.Ct. 2473, Cusano argues the electronic search condition improperly burdens his right to privacy. We do not believe the decision in *Riley* supports his contention.

In *Riley, supra*, 134 S.Ct. 2473 the court determined that the defendant's smart phone could not be searched under the search incident to lawful arrest exception to the warrant requirement. Given the substantial privacy interests people have in the information stored in such devices the court concluded that a search warrant would ordinarily be required to search those devices. While it is clear the court in *Riley* was persuaded that people have a protected privacy interest in such devices because of the nature of their use and their vast storage capacity, the same protected expectations of privacy exist with regard to searches of houses. (*Kyllo v. United States* (2001) 533 U.S. 27, 31.) However, general Fourth Amendment search waivers authorize searches of homes among other things that have protected privacy interests. (*United States v. Knights* (2001) 534 U.S. 112.)

The trial court addressed Cusano's claim that the condition was overbroad in light of *Riley, supra*, 134 S.Ct. 2473. The court responded:

"I immediately think [of] our current Fourth wavier not related to electronic devices. And it seems to me that, well, [its] effect, a Fourth waiver is a violation of someone's privacy. It becomes legal based on actions and—or crimes committed. So, therefore, the nature of why the condition . . . exists all of a sudden becomes relevant. [¶] And in that Fourth waiver search not related to

electronics, there are lot of incidental things, materials that are touched, looked through, that are completely irrelevant. Oftentimes, in searches, communications between defendants and their attorneys are taken, and then somewhere down the line, a judge has to decide whether those are relevant or not, or should they have been taken. There's always going to be that incidental irrelevant information that may or may not be sifted through. It seems to me that a Fourth wavier exists so people and persons in their residence can be searched because they are on a period in which they expose themselves to that particular conduct. [¶] I look at the electronic device the same way. There might be some collateral damage that . . . occurs there. No one likes to be searched. No one likes to have their pockets emptied. No one likes to have their things gone through. And when they do those searches, sometimes they don't find anything. But it just so happens, this is now what they have exposed themselves to based on the crime they commit."

We recognize, of course, the point made by *Riley*, *supra*, 134 S.Ct. 2473, that is electronic devices can store incredible amounts of data and they are now used for a wide range of personal activities. In that light, application of electronic search conditions must still narrowly tailor the intrusion to avoid unnecessary limitations on lawful activity. In that light, Cusano has cited several opinions which have struck down similar electronic search conditions. As we will discuss, each is distinguishable from our case because the crimes involved and the defendants' histories in those cases did not justify the added intrusion.

The case of *In re Malik J.* (2015) 240 Cal.App.4th 896, 902, involved a juvenile who did not use any electronic devices in the commission of the crime. Instead the crime involved a physical assault. The court found the electronic search condition inappropriate simply for general supervision of the minor.

The case of *In re J.B.* (2015) 242 Cal.App.4th 749, 756-757, similarly did not involve the use of electronic devices in the commission of the crime. The facts before us are significantly different than presented to that court.

In *People v. Ebertowski*, *supra*, 228 Cal.App.4th at pages 1175-1176, the court upheld an electronic search condition as necessary to successfully monitor the defendant's compliance with the terms of probation.

Cusano's case is more compelling for the use of an electronic search condition. The crime involved was identity theft. The facts indicate that Cusano and his cohorts used electronic devices to gain personal identification and to conduct their thefts. Cusano has a history of theft related offenses, indicating he has a considerable likelihood of re-offending if not closely monitored. Frankly, access to Cusano's use of electronic data and communication is necessary to prevent further loss by the public and to hopefully cause Cusano to refrain from further criminal activity. The electronic search condition in this case was properly imposed.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

BENKE, J.

NARES, J.